

403(b)



Perspectives

Insights into the Administration of §403(b) Tax-Sheltered Arrangements

FALL 2009

Adoption, Restatement and Amendment Deadlines

In accordance with IRS Notice 2009-3 (addressed in the 2009 Spring edition), the IRS deadline to adopt a 403(b) plan is fast approaching. Specifically, the deadline is December 31, 2009 with an effective date of January 1, 2009. In addition, the plan is to have operated under Code Section 403(b) and the final 403(b) regulations as of January 1, 2009. Although the IRS 403(b) Prototype Program is still in draft stage, the IRS requires a "best effort" 403(b) written plan to be adopted by December 31, 2009. Those that adopted a "best-effort" document in 2008 need not adopt another plan.

PPA Amendment Deadline

The Pension Protection Act of 2006 (PPA) requires that plans operate under PPA provisions as each becomes effective, but does not require that plans be amended until the end of the first plan year beginning on or after January 1, 2009. Ordinarily, required amendments like those for PPA changes could be made up until a plan's due date for filing its tax return for the 2009 plan year. However, the IRS has indicated that there may be anti-cutback issues (which if not correctly handled, would reduce a benefit already earned by the participant) if the PPA amendment is not

completed before the end of the plan year. (The IRS plans to publish a list of anti-cutback issues.) This amendment deadline applies to both interim and discretionary amendments made pursuant to statutory PPA provisions plus any PPA-related regulations. Thus, the PPA amendment should be made by December 31, 2009.

HEART, EESA, WRERA Amendments

The amendment for the Heroes Earnings Assistance and Relief Tax Act of 2008 (HEART) is not due until the 2010 plan year, although some plans are incorporating HEART and PPA provisions at the same time. The Emergency Economic Stabilization Act of 2008 (EESA) amendment is also not due until the 2010 plan year, but some plans are incorporating EESA and PPA provisions at the same time. An amendment for the provision suspending required minimum distributions, part of the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA), is not due until the 2011 plan year.

Some plans are amending for PPA, HEART, EESA and WRERA simultaneously in one amendment. ■

Additional Guidance on 2009 Waiver of Required Minimum Distributions

On September 24, 2009, the IRS issued Notice 2009-82 that provides guidance, transitional relief, sample plan amendments and answers to questions related to the waiver of 2009 required minimum distributions (RMDs) from defined contribution plans (such as 401(k) plans, 403(b) plans and certain 457(b) plans) and from individual retirement arrangements (IRAs).

The Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) waives RMDs for 2009. The WRERA allows plan sponsors to make plan or contract amendments related to the 2009 RMD waiver up to the last day of the first plan year beginning in 2011 (2012 in the case of a governmental plan), as long as the plan or contract operates as if the amendments were in effect from its effective date. Due to the waiver of 2009 RMDs, distributees may roll over any amount they received from a defined contribution plan that would have been an RMD for 2009, but for WRERA, and that otherwise meets the definition of an eligible rollover distribution (ERD). However, the distribution is not treated as an ERD for purposes of requiring the plan to offer a direct rollover of that amount, mandatory 20% withholding or providing an ERD notice to the distributee.

Transitional Relief for Plan Participants and IRA Owners

For plan participants and IRA owners who have already received 2009 RMDs, and the 60-day rollover period has expired, the IRS is extending the period to roll over most of such distributions until November 30, 2009. However, for IRAs, only one distribution per IRA will be eligible for this rollover relief due to the one-rollover-per-year rule.

Transitional Relief for Plan Sponsors

The IRS recognizes that many plans, due to the enactment of WRERA shortly before the beginning of 2009, were unable to timely modify their administrative procedures to stop, or give participants and beneficiaries the choice to stop 2009 RMDs. Therefore, the IRS will **NOT** consider a plan to have failed to operate in accordance with its terms merely because during the period beginning on January 1, 2009, and ending on November 30, 2009,

the plan's operation conflicts with the adopted sample amendment. This transitional relief is granted whether or not a plan:

- paid distributions that equal the 2009 RMDs, or that are one or more payments in a series of substantially equal distributions (that include 2009 RMDs) made at least annually and expected to last for the life (or life expectancy) of the participant, the joint lives (or joint life expectancy) of the participant and the participant's designated beneficiary or at least 10 years;
- gave participants and beneficiaries the option of stopping 2009 RMDs;
- gave participants and beneficiaries the option to continue 2009 RMDs; or
- gave participants the option to directly roll over certain RMD-related distributions described in the adopted sample amendment.

Additional Guidance

Notice 2009-82 also contains questions and answers addressing issues raised from the public regarding the 2009 RMD waiver. For example, this additional guidance provides that:

- The deadline for an employee or a beneficiary that had until the end of 2009 to choose between receiving distributions under the 5-year or the life expectancy rule is extended until the end of 2010.
- In plans that permit a nonspouse-designated beneficiary to directly roll over a deceased participant's account balance, the special rule in Notice 2007-7 is modified so that, if the employee died in 2008, the nonspouse-designated beneficiary has until the end of 2010 to make the direct rollover and use the life expectancy rule.
- Only for 2009, if an individual receives a plan distribution that includes a 2009 RMD, the portion of the distribution that represents the 2009 waived RMD is subject to the optional 10% withholding rules under §3405(b) and any remaining portion is subject to the 20% mandatory withholding rule of §3405(c) (assuming the distribution otherwise qualifies as an ERD). Any

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distributions made in 2009 are deemed to consist first of any undistributed RMDs from prior years followed by 2009 RMDs.

- The 2009 RMD waiver does not apply to payments that are part of a series of substantially equal periodic payments under the "RMD method" (a payment method that satisfies the §72(t)(2)(A)(iv) 10% early withdrawal tax exception).

Plan Amendments

Notice 2009-82 provides two sample plan amendments that individual or preapproved plan sponsors may adopt or use to amend their plans. The amendments permit participants to choose to receive or not receive 2009 RMDs, but only if the distribution(s) are:

- equal to the 2009 RMDs; or
- one or more payments in a series of substantially equal distributions (that include the 2009 RMDs) made at least annually and expected to last for the life (or life expectancy) of the participant, the joint lives (or joint life expectancy) of the participant and the participant's designated beneficiary or at least 10 years.

Depending on which sample amendment a plan chooses to adopt, the plan can either:

- cease making 2009 RMDs unless a participant or beneficiary elects otherwise; or
- continue making 2009 RMDs unless a participant or beneficiary elects otherwise.

Both sample amendments provide direct rollover options (in addition to those already offered by the plan) that plan sponsors can choose to offer. Plan sponsors may need to tailor the sample amendment to their plan's particular terms and administrative procedures and must adopt the amendment no later than the last day of the first plan year beginning on or after January 1, 2011 (January 1, 2012, for governmental plans). The IRS will not treat an employer's adoption of one of these sample plan amendments (including necessary modifications) as affecting their master and prototype or volume submitter plan's preapproved status. Nor will such adoption affect the status of an individually designed plan. Thus, such employers can continue to rely on their favorable opinion, advisory or determination letters. ■

Summary Prospectus and ERISA 404(c)

On September 8, 2009, the DOL issued Field Assistance Bulletin (FAB) 2009-3 addressing the delivery of a Summary Prospectus to satisfy obligations under ERISA Section 404(c) regulations. The FAB describes the circumstances in which a participant-directed individual account plan may satisfy the prospectus delivery requirements of Section 404(c) by providing a Summary Prospectus.

The Securities and Exchange Commission (SEC) issued Summary Prospectus requirements under the new Rule 498 of the Securities Act (the Act) for satisfying mutual fund prospectus delivery requirements on January 26, 2009. These enhanced mutual fund disclosure rules satisfy the requirements

of Section 5(b)(2) of the Act, and replace the mutual fund Profile that was previously described under the former Rule 498 of the Act. In 2003, the DOL approved the use of the mutual fund Profile to satisfy ERISA's 404(c) compliance requirements based on the requirements of ERISA 404(c) and the former Rule 498. The DOL believes the delivery of a Summary Prospectus, both automatically and upon request by an identified plan fiduciary or designee, to plan participants or beneficiaries, satisfies the prospectus delivery requirement of ERISA 404(c).

The Summary Prospectus is a short-form document written in plain English, in a clear and concise format, and its required contents provide a

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summary of key information about a mutual fund that is useful to participants and beneficiaries in evaluating and comparing their plan investment options. It must include at the beginning or on the cover page, the mutual fund's name, the share classes to which the Summary Prospectus relates, the ticker symbol for each such class, and a required legend containing a Web site address, the approximate date of the Summary Prospectus' first use, e-mail address, and toll-free telephone number where investors may obtain the statutory prospectus and other information free of charge. In addition, the Summary Prospectus must contain the key information required to appear at the beginning of the statutory prospectus under the new rules, including

information regarding the investment objectives or goals of the fund, fee and expense information, principal investment strategies, the risks associated with an investment in the fund, fund performance, investment advisers and sub-advisers, portfolio managers, purchase and sale of fund shares, tax information, and financial intermediary compensation.

The FAB did not contain an effective date; thus, as the SEC change was in January of 2009, ERISA 403(b) plans should begin complying with ERISA 404(c) prospectus delivery requirements by using the Summary Prospectus immediately. ■

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